Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Applications for Consent to the	)	
Transfer of Control of Licenses	)	
	)	
Comcast Corporation and	)	MB Docket No. 02-70
AT&T Corp., Transferors	)	
	)	
To	)	
	)	
AT&T Comcast Corporation,	)	
Transferee	)	
	)	

To: The Commission

COMMENTS

BELLSOUTH CORPORATION,
BELLSOUTH ENTERTAINMENT, L.L.C.,
BELLSOUTH INTERACTIVE MEDIA SERVICES, L.L.C.,
BELLSOUTH TELECOMMUNICATIONS, INC., AND
BELLSOUTH WIRELESS CABLE, INC.

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SUMMARY

AT&T Corp. ("AT&T") and Comcast Corporation ("Comcast") (collectively "Applicants") seek permission to transfer control of FCC licenses and authorizations controlled by their wholly- or majority-owned subsidiaries to AT&T Comcast Corporation ("AT&T Comcast"). The proposed merger would concentrate the cable television market in AT&T Comcast, which would serve nearly 30% of the nation's multi-channel video programming distribution ("MVPD") customers. AT&T Comcast also would serve more than 2.5 million high-speed Internet cable modem access lines—over one third of all cable modem customers.

Cable modem service is an interstate information service and currently is not regulated by the Commission. It is the dominant technology serving the mass market for high-speed Internet access. Digital subscriber line ("DSL") service provided by incumbent local exchange carriers ("ILECs") is the only significant competitor to cable modem service. Thus, absent competition from ILEC DSL services, AT&T Comcast unquestionably would have an increased ability to raise prices for their cable modem services.

The Commission must determine whether the merger will be in the public interest. Under current merger standards, the Commission must balance the potential benefits of the transaction against the risks that the transaction may create or enhance barriers to entry into the developing mass market for broadband services.

Current Commission rules regulate ILEC delivery of DSL service far more heavily than they regulate cable modem service. These regulatory disparities already hamper the effectiveness of DSL service as competition for cable modem service. They

1) create significant disincentives to ILEC investment in DSL and other new broadband equipment, 2) delay the rollout of DSL and other broadband services, and 3) raise the costs of those services. Providing AT&T Comcast with additional competitive advantages while retaining regulatory disparities that already make DSL service providers less effective competitors in the marketplace would exacerbate AT&T Comcast's ability to dominate the mass market for broadband services.

On balance, under current regulatory circumstances, the proposed transaction would not serve the public interest. Thus, the Commission should not approve the transaction without accounting for these significant negative consequences. The Commission can best do that by removing these regulatory disparities, thereby ensuring ILEC DSL competition to cable modem service. Then, but only then, it should approve the instant merger.

The transaction also would increase AT&T Comcast's control of programming vital to BellSouth and other competitors to AT&T Comcast's cable properties. That concentration is further manifestation that marketplace conditions have worsened since 1992 when Congress enacted Section 628 of the Cable Competition and Consumer Protection Act of 1992. 47 U.S.C. §548. Accordingly, the Commission should extend the prohibition against exclusive contracts between vertically integrated cable networks and incumbent cable operators contained in §628(c)(2)(D), in CS Docket No. 01-290.

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To: The Commission

COMMENTS OF BELLSOUTH CORPORATION, BELLSOUTH ENTERTAINMENT, L.L.C., BELLSOUTH INTERACTIVE MEDIA SERVICES, L.L.C., BELLSOUTH TELECOMMUNICATIONS, INC., AND BELLSOUTH WIRELESS CABLE, INC.

BellSouth Corporation, BellSouth Entertainment, L.L.C., BellSouth Interactive Media Services, L.L.C., BellSouth Telecommunications, Inc., and BellSouth Wireless Cable, Inc. (collectively "BellSouth"), hereby respectfully comment in the instant proceeding.[1] As discussed below, the proposed merger will be in the public interest only if the merged cable entity will face competition from incumbent local exchange carriers ("ILECs") in the mass market for broadband services. Prior to approving this transaction, the Commission must remove regulatory obstacles that impede ILEC competition with cable companies in that market. It should also extend the Federal program access safeguards in CS Docket No. 01-290.

[1] *See*, Public Notice, *AT&T Corp. and Comcast Corp. Seek FCC Consent for a Proposed Transfer of Control,* MB Doc. No. 02-70, DA 02-733 (rel. Mar. 29, 2002).

I. INTRODUCTION

AT&T Corp. ("AT&T") and Comcast Corporation ("Comcast") (collectively "Applicants") seek permission to transfer control of FCC licenses and authorizations controlled by their wholly- or majority-owned subsidiaries to AT&T Comcast Corporation ("AT&T Comcast"). If authorized, the proposed $58 billion dollar merger would concentrate the cable television market by consolidating AT&T Broadband, already the largest cable company,[2] with Comcast, the third largest cable operator.[3] AT&T Comcast would serve nearly 30% of the nation's multi-channel video programming distribution ("MVPD") customers.[4] It would serve over 42% of such customers if the Commission were to include the customers in Time Warner Entertainment ("TWE") and Time Warner Inc. ("TWI") cable systems in which AT&T holds limited partnership interests.[5] Moreover, AT&T Comcast would serve more than 2.5 million high-speed Internet cable modem access lines.[6] This is more than one third of all cable modem customers.

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[2] *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Doc. No. 01-129, FCC 01-389 (rel. Jan. 14, 2002), p. 98, Table C-3 ("*2002 Annual Video Programming Assessment*").

[3] Comcast Cable Communications, Inc., Form 10-K for Fiscal Year Ended Dec. 31, 2001 (filed with U.S. Sec. & Exch. Comm'n, March 29, 2002), Part I, Item 1.

[4] *In the Matter of Applications for Consent to the Transfer of Control of Licenses of Comcast Corporation and AT&T Corp, Transferors To AT&T Comcast Corporation, Transferee,* MB Doc. No. 02-70, Applications & Public Interest Statement, Description of Transactions, Public Interest Showing, and Related Demonstrations (filed Feb. 28, 2002), ("AT&T Comcast Public Interest Showing"), p. 49.

[5] *Id.*, p. 51 n. 95.

[6] *Id.,* p. 29.

The Commission must determine whether such a merger would be in the public interest. Under current merger precedent, the Commission must balance the potential benefits of the transaction against the risks that the transaction may create or enhance barriers to entry into the broadband service mass market.

Cable modem service is an interstate information service and is not currently regulated by the Commission. It is the dominant technology in the high-speed Internet access mass market, today. Digital subscriber line ("DSL") service provided by incumbent local exchange carriers ("ILECs") is virtually the only thing preventing cable companies from raising cable modem prices.[7]

Current Commission rules regulate ILEC delivery of DSL services far more heavily than they regulate cable modem services.[8] These disparities already hamper the effectiveness of DSL services as competition for cable modem services. These disparities in regulation 1) create significant disincentives to ILEC investment in DSL and other broadband equipment, 2) delay the rollout of DSL services, and 3) raise the costs of those services in the mass market for broadband services.

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[7] *In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GN Doc. No. 00-185, FCC 02-77 (rel. Mar. 15, 2002), pp. 6-7, ¶ 9 ("Residential high-speed Internet access services are provided primarily over coaxial cable wires in the form of cable modem service offered by cable operators, and over copper wires in the form of digital subscriber lines ('DSL') services offered by local exchange carriers ('LECs')).")

[8] *See, e.g.,* Comments of BellSouth Corporation, *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunication Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Doc. No. 98-146 (filed Sept. 14, 1998); Reply Comments of BellSouth Corporation, *In the Matter of Applications of AT&T Corporation, Transferee, and Tele-communications, Inc., Transferor, for Consent to Transfer Control Pursuant to Section 310(d) of the Communications Act, as amended, of Licenses and Authorizations Controlled by TCI or its Affiliates or Subsidiaries*, CC Docket No. 98-178 (filed Nov. 13, 1998).

Applicants claim the instant transaction would make them more efficient and more competitive in their markets. For example, they claim it would enhance their ability to finance capital expenditures to accelerate the necessary upgrades to AT&T Broadband systems.[9] They claim savings from reduced corporate overheads and improved operating margins within 5 years worth about $1.25 to $1.95 billion a year in increased EBITDA.[10] They also claim that scale economies will reduce capital expenditures an estimated $200-300 million annually over the next four years.[11] Further, they claim they would be able to save in other ways, including taking advantage of volume discounts in purchasing Internet Backbone services, consolidating call centers, and centralizing other functions.[12]

Providing AT&T Comcast with these additional advantages while retaining regulatory disparities that already make DSL service providers less effective competitors in the marketplace would increase AT&T Comcast's ability to dominate the mass market for broadband services. This would not serve the public interest.

II. BELLSOUTH'S INTEREST IN THIS MATTER

BellSouth competes with AT&T Broadband and Comcast. A BellSouth affiliate holds cable franchises in: Vestavia Hills, Alabama; St. Johns and Miami/Dade Counties and Davie and Pembroke Pines, Florida; the Counties of Cherokee, Cobb, DeKalb, and Gwinnett and the Cities of Chamblee, Duluth, Lawrenceville, Roswell, and Woodstock,

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[9] AT&T Comcast Public Interest Showing, p. 30.

[10] *Id.*, p. 31.

[11] *Id.*, p. 33.

[12] *Id.*, p. 34.

Georgia.[13] BellSouth competes directly with AT&T Broadband's video programming services in Cobb, Dekalb and Gwinnett Counties, Georgia, in the Cities of Chamblee, Duluth, and Roswell, Georgia, and in St. Johns County, Florida. It also competes with AT&T Broadband's and Comcast's video programming services in the City of Pembroke Pines, the Town of Davie, and Miami/Dade County, Florida.

Additionally, BellSouth Telecommunications, Inc. provides DSL services in its telephone franchise areas in Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee. BellSouth's DSL services currently compete head-to-head with AT&T Broadband's cable modem services in Ft. Lauderdale, Jacksonville, and Miami, Florida; and in Atlanta, Georgia; and with Comcast's cable modem services in Huntsville and Mobile, Alabama; Panama City, Florida; Atlanta, Augusta, and Savannah, Georgia; Charleston, South Carolina; and Chattanooga, Knoxville, and Nashville, Tennessee.

III. MERGER REVIEW STANDARD

Applicants bear the burden of proof to establish that the instant transaction is in the public interest.[14] Not only must they prove that the merger will have beneficial public

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[13] *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Doc. No. 01-129, FCC 01-389 (rel. Jan. 14, 2002), p. 48 n. 359 ("*Eighth Annual Report*").

[14] *See, e.g., In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor, to AT&T Corp., Transferee*, CS Doc. No. 99-251, 15 FCC Rcd 9816, 9820 (2000) ("*AT&T/Media Order*"); *In the Matter of Application for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications Inc., Transferor, to AT&T Corp., Transferee*, CS Doc. No. 98-178, 14 FCC Rcd 3160, 3169 (1999) ("*AT&T/TCI Order*").

interest aspects, but they must demonstrate that these benefits outweigh the aspects of the transaction that may harm the public interest.[15]

As the Commission noted in its *AOL Time Warner Order*:

> The balancing of potential harms and benefits to the public interest is particularly appropriate in the context of reviewing license transfer applications that are associated with significant mergers because such mergers are likely to create potential for both good and ill. For example, the same concentration of assets that may support technological innovation by providing sufficient capital to take the necessary risks or by reducing transaction costs may also allow the merged entity to create or enhance barriers to entry by its competitors.[16]

The Commission noted: "the Communications Act requires the Commission to make an independent public interest determination, which includes evaluating public interest benefits or harms of the merger's likely effect on future competition. To find that a merger is in the public interest, therefore, the Commission must 'be convinced that it will enhance competition.'"[17]

The Commission cannot simply rely on applicants' contentions that, by consolidating their networks and management skills, they will be more efficient and the markets will be more competitive. Rather, according to the Commission:

> Our public interest evaluation necessarily encompasses the "broad aims of the Communications Act." These broad aims include, among other things, ensuring the existence of a nationwide communications service, available to everyone; implementation of Congress's pro-competitive, deregulatory national policy framework designed to open all telecommunications markets to

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[15] *See, e.g., In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee*, CS Doc. No. 00-30, 16 FCC Rcd 6547, 6554-7 (2001) ("*AOL Time Warner Order*").

[16] *Id*., p. 6550.

[17] *Id*., p. 6555 (footnote omitted).

> competition; the preservation and advancement of universal service; and the acceleration of private sector deployment of advanced services.[18]

Thus, the Commission must also consider the impact of that consolidation on the marketplace.

When a particular merger arises, the Commission may be considering competitive policy issues affecting that industry at the same time in rulemaking proceedings. Nevertheless, the Commission must consider whether that transaction will adversely impact those markets and must take remedial action within the context of the transfer application process if required to serve the public interest. For example, in its *AOL/Time Warner Order*, the Commission found that it was required to balance certain competitive considerations "and resolve them with respect to several of the major issues presented by the facts, including one issue that is currently the subject of a notice of inquiry that may lead to a rulemaking proceeding."[19]

The Commission explained:

> 15. We recognize that there is a difference between intervention to preserve a level of competition that will allow a market to operate effectively and the kind of substantial regulatory intervention that is required to compensate in markets where sufficient competition is lacking. The 1996 Act reflects a clear preference that competitive markets, as opposed to regulated monopolies, be created and preserved as the mechanism for economic decision making. Mergers can reflect the healthy operation of competition, creating more efficient collections of assets; but they can also threaten its continued existence, eliminating competitors or creating opportunities to disadvantage rivals in anticompetitive ways. We are guided both by the desire to avoid intervention and the realization that some degree of timely intervention to preserve competition may avoid a later need for more onerous intervention

[18] *Id*., p. 6555-56 (footnotes omitted).

[19] *Id*., p. 6551.

> to either regulate where competition has disappeared or to attempt to reintroduce competition once it has been eliminated.
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> 16. We also recognize that the same consequences of a proposed merger that are beneficial in one sense may be harmful in another. For example, combining assets may allow the merged firm to reduce transaction costs and offer new products; but if the merged firm has market power, these advantages may operate to consolidate that power.[20]

As the Commission explained in another transaction:

> Both the Title II public convenience and necessity standard and the Title III public interest convenience and necessity standard are to be "so construed as to secure for the public the broad aims of the Communications Act." These broad aims include those expressed in Section 1 of the Communications Act, to "make available…to all the people of the United States … a rapid, efficient, Nation-wide, and world-wide … communications service," and those expressed in the 1996 Act, to establish a "pro-competitive, deregulatory national policy framework designed to … open[] all telecommunications markets to competition." Thus, we believe the public interest standard necessarily encompasses the goals of promoting competition and deregulation. Moreover, because interstate switched access is generally provided over the same "bottleneck" facilities and by the same providers as provide local exchange and exchange access service, failure to create competition among local service providers necessarily means a lack of competition to provide interstate switched access.[21]

Ironically, despite the express congressional preference for a deregulatory policy, a past Commission concluded that the public interest required it to impose **additional** and controversial regulations and conditions on the transferees in order to offset the perceived need to stimulate competition. In *AOL Time Warner*, for example, the Commission

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[20] *Id*., p. 6553.

[21] *In the Matter of Applications of NYNEX Corporation, Transferor, and Bell Atlantic Corporation, Transferee, for Consent to Transfer Control of NYNEX Corporation and its Subsidiaries*, File No. NSD-L-96-10, 12 FCC Rcd 19985, 20002-03 (1997) ("*Bell Atlantic/ NYNEX Order"*).

imposed regulatory obligations on AOL Time Warner requiring it to provide unaffiliated ISPs access to AOL Time Warner's cable modem and Instant Messaging Services.[22]

The Commission also imposed extensive and complex new regulatory requirements on Bell Atlantic and SBC compelling them to provide local exchange and exchange access services in territories of other ILECs across the country.[23] These markets were not even directly at issue in those proceedings and yet, the Commission imposed new and complex regulations on those carriers in the name of stimulating competition.

An alternative to imposing additional regulations is to create and foster additional competition. This would be consistent with the Congressional mandate to deregulate where possible and with Commission precedents that rely on the fact that competition is far more effective than regulation in governing markets and serving the public interest.

IV. UNDER CURRENT REGULATORY CONDITIONS, THE INSTANT APPLICATIONS WOULD IMPAIR COMPETITION IN THE MASS MARKET FOR ADVANCED SERVICES AND, THEREFORE, WOULD NOT BE IN THE PUBLIC INTEREST

As noted above, a transaction may promote technological innovation by providing a firm sufficient capital to take the necessary risks to compete in a market or by reducing the firm's transaction costs to compete more efficiently in that market. At the same time the transaction may be contrary to the public interest because it also would allow the

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[22] *AOL Time Warner Order*, pp. 6678-80.

[23] *In the Matter of Applications of Ameritech Corporation, Transferor, and SBC Communications Inc., Transferee, for Consent to Transfer Control of Corporations Holding Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission's Rules*, 14 FCC Rcd 14712, 14954, and Conditions at Appendix C, 14964-15168 (1999) ("*SBC/Ameritech Order*"); *Bell Atlantic/NYNEX Order*, p. 20097, Conditions at Appendix C, pp. 20107-20112, and Performance Monitoring Reports at Appendix D, pp. 20113-20123.

merged entity to use its market power in one market to harm competition in another market.

Applicants concede that the existence of competition from ILEC DSL service is relevant to this proceeding. Applicants contend the merger will allow them to "accelerate the availability of local telephony, digital video, high-speed Internet service, and other broadband services to millions of customers in areas of 41 states. This increase in facilities-based competition for each of these services will … provide important consumer benefits by creating choices in a range of services and accelerating competition and innovation for new advanced services and features."[24] They also contend that the merger will spur broadband deployment by ILECs and others in this market.[25]

The Applicants anticipate that ISPs will ask the Commission to require AT&T Comcast to provide ISPs with open access to its cable modem services. Applicants attempt to avoid such requirements by claiming there is "strong and increasing competition from incumbent LEC and other DSL providers…."[26]

The Commission has acknowledged the importance of ILEC presence in the broadband services mass market as competition to cable modem service. Specifically, the Commission authorized an earlier merger involving AT&T as being in the public interest on a belief that "consumers can choose among various alternative broadband access providers, such as DSL, wireless, and satellite…."[27]

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[24] AT&T Comcast Public Interest Showing, p. 28.

[25] *Id*., p. 29.

[26] *Id*., p. 92.

[27] *AT&T/MediaOne Order*, p. 9866.

As noted above, the merger standard enunciated by this Commission requires it to look at the potential downside of the transaction because Applicants will have an increased ability and incentive to use their incumbent cable facilities in which they have market power, to compete in the developing broadband services mass market. Neither they nor the Commission can simply assume that there will continue to be strong competition from DSL providers in either of these markets.

Without that ILEC competition, AT&T Comcast would be able to use its increased control over cable businesses and the cable modem businesses to impair competition in the mass market for broadband services. The positive aspects of the instant Application would not outweigh that harm.

1) The Instant Applications Would Increase Concentration of the Video Programming Distribution Market into AT&T Comcast and AT&T Comcast Would Have Market Power in that Market

More than six years ago, Congress established a new telecommunications policy in this country favoring competition over regulation. The Applicants embrace that policy and assert that "[b]y promoting the deployment of facilities–based competition, the merger will further Congress's goal of establishing 'a pro-competitive, de-regulatory national policy framework' for the U.S. telecommunications industry".[28]

Congress also expected ILECs to compete with cable providers in the residential cable market and to lower cable rates For example, Senator Pressler stated: "The bill attempts to get everybody into everybody else's business and let in new entrants…It will lower cable TV rates through competition."[29] Senator Hollings stated: [T]his bill is

[28] AT&T Comcast Public Interest Showing, pp. 37-8, citing S. Conf. Rep. No. 104-23, 104th Cong., 2d Sess. 1 (1996).

[29] 142 Cong. Rec. S686-87 (daily ed. Feb. 1, 1996) (statement of Sen. Pressler).

intended to promote competition in every sector of the communications industry, including the broadcast, cable, wireless, long distance, local telephone, manufacturing, pay telephone, electronic publishing, cable equipment, and direct broadcast satellite industries."[30]

The Senator was concerned that cable rates would increase in the absence of either rate regulation or competition. He agreed to the deregulation of "upper tier" cable rates on March 31, 1999. "By that time," he said, "we expect that competition from DBS and wireless cable, and perhaps from telephone companies, will provide enough restraint on further cable rate increases."[31] Senator Leahy expressed similar concerns about cable rate increases.[32] "I am afraid we are going to let them [cable companies] go before we have the protections provided by effective competition."[33]

Recognizing the potential disciplining effects on cable rates from facilities-based competition from ILECs, Congress lifted its previous ban against local telephone companies offering cable services in their franchised telephone service areas. But Congress did not stop there; it took several deregulatory steps to reduce the cost and regulatory impediments to ILEC entry into cable. For example, it relieved the ILECs from the obligation of obtaining a certificate under § 214 of the Act. 47 U.S.C.A. § 571 (c).

Congress wanted to encourage ILECs to invest in new plant to offer cable service. Accordingly, it expressly exempted ILECs' open video systems or cable systems from the

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30 *Id.*, p. S687 (statement of Sen. Hollings).

31 *Id.*, p. S688.

32 *Id.,* pp. S692-93 (statement by Sen. Leahy).

33 *Id.*, p. S693

network opening requirements of Title II. *Id*., § 571 (b). Wanting to ensure that ILECs competed on a facilities basis, Congress generally prevented ILECs from simply acquiring cable operators within an ILEC's telephone service areas. *Id*. § 572.

While these steps were laudable, they have failed to create meaningful facilities-based ILEC competition to incumbent cable companies. It is clear that AT&T Broadband and Comcast have market power in the market for MVPD and that the instant transaction will further concentrate that market power. Just this month the Commission issued its Report on Cable Industry Prices.[34]

Ten years after the enactment of the Cable Television Consumer Protection and Competition Act of 1992, the Commission estimated that, under the test set forth in that Act, competitive operators serve only about 6% of cable households nationwide.[35] According to the Commission, there were only 368 operators in the "competitive group" while there were 9,789 operators in the noncompetitive group.[36]

The absence of competition to cable companies has harmed the public. The data show that the competitive price differential between the competitive and noncompetitive groups was 6.3% for 2000 and 2001.[37] Additionally, where cable companies face

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[34] *In the Matter of Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992*, MM Doc. No. 92-266, FCC 02-107 (rel. Apr. 4, 2002) ("*2002 Cable Price Report*").

[35] *Id*., p. 3 n. 12.

[36] *Id*., p. 4, ¶ 11. The Commission noted: "if a multiple system operator ('MSO') has ten cable systems, that MSO is considered to be 10 operators for purposes of this report." *Id*., n. 13.

[37] *Id*., pp, 3-4, ¶ 8.

effective competition, the competitive price differential for average monthly rates on a per channel basis was even larger --9.4%-- for 2001.[38]

Facilities-based competition from wireline carriers like BellSouth could have been the most effective method of creating competition to incumbent cable monopolies. According to the Commission, "cable subscriptions tend to be lower in those areas where a wireline competitor provides a substitute for cable service. The estimated coefficient for the DBS overbuild variable, however, is also negative but is not statistically significant, which suggests that the presence of effective competition due to DBS overbuild status has no measurable effect on the demand for cable service."[39] Cable service as measured by the number of channels offered also increases where wireline competitors are present (but there was no measurable effect where a finding of effective competition was due to DBS penetration).[40]

At a more detailed level, the Commission:

> estimated for 2001 that competitive operators that meet the LEC test had rates that were 7.7% lower than the noncompetitive group. For the same year, the regression coefficients for the wireline overbuilds and low penetration subcategories indicated that the prices charged by operators belonging to these subcategories were 7.0% and 4.7% lower, respectively, than the rates charged by the noncompetitive group.[41]

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[38] *Id*., p. 4, ¶ 8. The Commission stated that a 5% level of price difference is statistically significant. *Id*., p. 7 n. 23.

[39] *Id*., pp. 17-18, ¶ 44.

[40] *Id*., p. 18, ¶ 46. The Commission has noted: "[W]here effective competition is achieved as a result of DBS penetration, there is no measurable effect on cable subscriptions, the price of cable service, or the number of channels offered." *Id*., p. 19.

[41] *Id*., p. 15, ¶ 37.

Nevertheless, the Commission noted in January 2002, "ILECs have largely exited the video business.[42] As a result, Congress and the Commission have not been successful in eliminating cable companies' market power.

2) Granting the Instant Applications Also Would Increase the Concentration of Cable Modem Service under AT&T Comcast Creating the Potential for AT&T Comcast to Use its Market Power to Dominate The Nascent Mass Market for Broadband Services

Cable companies have been able to use their market power in cable services to gain a dominant position in the broadband services mass market. Recently, the Commission reported that there were 3.9M cable modem subscribers at the end of 2000.[43] It also reported that, by June 2001, that number had increased by nearly 1.7M subscribers to 5.6M customers, more than a 43% increase over end-of-year 2000 subscribership. The Commission also estimated that cable companies would add another 1.6M customers by the end of 2001, for a total of 7.2M subscribers. The 3.3M additional cable modem customers in 2001 represented an increase of over 84% over the end of year 2000 base.

This transaction would concentrate Applicants' share of cable modem subscribers under a single company. AT&T Comcast would serve 2.5M cable modem subscribers,[44]

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[42] *2002 Annual Video Programming Assessment*, p. 48, ¶¶ 100, 101-03.

[43] *Id*., pp. 22-23, ¶ 44.

[44] AT&T Broadband and Comcast are already well situated to offer these services. Even without the merger, they admit that 95% of Comcast's customers are served by systems with bandwidth of 550 MHz or more, and over 80% are served by systems with bandwidth of 750 MHz or higher. By the end of 2001, 76% of AT&T Broadband plant was upgraded to at least 550 MHz, and 59% had at least 750 MHz. AT&T Comcast Public Interest Showing, pp. 10, 18. These numbers also demonstrate the fact that Applicants do not need the instant transaction as an impetus to upgrade their cable systems to provide digital cable or other new services.

making it the largest single provider of cable modem services in the country. It would serve one third of all cable modem subscribers.[45]

By contrast, the Commission found that there were 1.9M DSL subscribers at the end of 2000.[46] By June, according to the Commission, DSL providers had added 1.4M for a total of about 3.3M customers. Similarly, the Commission estimated that DSL providers would add another 1.0M subscribers by end of year 2001 for a total of 4.3M customers.

ILEC- provided DSL service is the most significant competitor to cable modem service.[47] While the Commission noted that cable modem's share of the broadband Internet access market has decreased[48], this is simply a function of the fact that cable companies were able to exploit their technological and regulatory advantages to gain a large number of customers before DSL providers did.

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[45] *2002 Annual Video Programming Assessment*, p. 25. The Commission estimated that AOL Time Warner had 1.4M subscribers on its own cable systems by June 2001, and that AT&T and Comcast had 1.3M and 675K, respectively, or about 2M cable modem customers on that date.

[46] *Id.*, pp. 22-23, ¶ 44, and n. 129.

[47] *Id*., p. 44; *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps To Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Doc. No. 98-146, FCC 02-33 (rel. Feb. 6, 2002), p. 23 ¶ 51 (ILECs "serve approximately 93 percent of ADSL subscribers, while competitive LECs serve about 7 percent.") The Commission indicated that satellite and wireless technologies serve only about eight percent of the market, but it does not expect them to increase market share over the "next several years." *2002 Annual Video Programming Assessment,* p. 23, ¶ 44. Analysts expect cable broadband to maintain this lead into 2004 when they expect 28.9% of households to access the Internet through cable, 21.1% through DSL, and 5.7% through satellite and wireless technologies. *Id*., p. 22 n. 126.

[48] *Id*., p. 22, ¶44.

What is relevant is that cable modem service providers added 3.3M customers in 2001 while DSL providers added only 2.5M (and, according to Commission estimates, only about 1.5M of these DSL subscribers are residential customers). Cable modem "adds" represented more than 56% of the 5.8M new customers added in 2001. Of the estimated 11.5M total customers estimated by the Commission for end-of-year 2001, cable companies served 7.2M customers or nearly 63% of the market. Clearly, cable modem providers have maintained and are maintaining a dominant share of the residential broadband market.

3) Disparate Regulation Between Cable Modem Service and DSL Service Is Already Negatively Impacting Competition in the Mass Market for Advanced Services and These Negative Impacts Would Be Exacerbated by the Instant Applications

The Department of Justice has long recognized that applying a different degree of regulation to some firms competing in a given market distorts the market and harms competition unless those regulations are imposed on their rivals.[49] As Verizon recently noted with specific regard to the disparity in regulation between the cable companies and the ILEC industry, "Experience shows that the market will pick winning strategies and technologies if regulators get out of the way and allow the market to work. As Professor Kahn and Dr. Tardiff explain: 'No one can possibly know the ultimate size of the market and how it will be supplied. The task of policy is to remove all remedial hindrances to the competitive markets giving us the definitive answers.'"[50]

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[49] Reply Comments of the United States Department of Justice, *Competition in the Interstate Interexchange Marketplace*, CC Doc. No. 90-132, p. 26 n. 42 (filed Sept. 28, 1990).

[50] Comments of Verizon, CC Doc. No. 01-337 (filed Mar. 1, 2002), pp. 26-27 (footnote omitted).

Former Chairman Kennard echoed this point nearly four years ago:

> When Congress passed the Telecommunications Act of 1996, it envisioned a world in which cable and telephone industries would compete in each others' markets …. [N]ot many people thought at that time that the true catalyst for competition would be Internet access. But the race is on …. [The FCC's] job is to make sure that there is a race, and one in which no competitor is advantaged or disadvantaged by government.[51]

There can be no serious question that cable modems and DSL serve the same market. As BellSouth has shown:

> The economic similarities of ILECs and cable companies are significant. The services that ILECs and cable modem providers are marketing are both directed toward the mass market. Each has an existing customer base and an existing network. Both are new entrants into the broadband market and therefore neither is dominant, even though cable modem providers have a clear lead on the number of customers. Both have made large investments in their networks and have considerable resources to devote to deployment.[52]

Yet, as BellSouth has demonstrated in numerous other proceedings over nearly a four year period, in the past the Commission has imposed more and more regulation on the ILECs' DSL service offerings while permitting cable modem providers to operate in the same market (*i.e.*, mass market for broadband services) free of regulation in their

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[51] Chairman William Kennard, Remarks to National Cable Television Association (May 5, 1998) ("Kennard Remarks").

[52] Comments of BellSouth Corporation, CC Doc. No. 01-337 (filed Mar. 1, 2002), p. 17. Applicants' efforts to claim the relevant market should include narrowband or "dial-up" technology are unavailing. Verizon recently provided an analysis describing the differences between the broadband and narrowband markets and pointed out that every government agency that has considered this issue agreed that they are separate markets. Comments of Verizon, CC Doc. No. 01-337 (filed Mar. 1, 2002), pp. 9-13, and Exhibit B (Declaration of Dennis W. Carlton and Hal S. Sider); *see also*, Declaration of Robert W. Crandall and Gregory Sidak, ¶ 33 n. 34 (attached to SBC Petition for Expedited Ruling That It Is Non-Dominant in Its Provision of Advanced Services and for Forbearance from Dominant Carrier Regulations of Those Services (filed Oct. 2, 2001)).

cable modem operations.[53] These disparities discourage ILEC investment, raise ILEC costs, and otherwise impair the ILECs' ability to compete with cable companies in the high-speed broadband services mass market.

A. Regulatory Disparities Are Significant and May Increase:

Despite the economic similarities between cable modem and ILEC DSL service, the Commission currently imposes far more regulation on the ILECs and threatens to impose even more. Differences include:

- ILECS are barred from offering broadband services across LATA boundaries; cable modem providers are not;
- Many ILEC services are subject to price regulation, and ILECs must file tariffs with the Commission to establish the rates, terms and conditions of these services; cable modem providers do not;
- ILECS, under certain circumstances, must unbundle their networks for competitors to provide broadband services; cable modem providers do not;
- ILECS must permit their broadband competitors to collocate on their premises; cable modem providers do not; and,
- ILECS must allow their broadband competitors access to their loop facilities on a shared basis; cable modem providers do not.[54]

And these are not the only regulatory differences. The Commission also requires ILECs to unbundle their packet switching networks including their digital subscriber line

[53] Reply Comments of BellSouth Corporation, CC Doc. No. 01-337 (filed Apr. 22, 2002); Comments of BellSouth Corporation, CC Doc. No. 01-337 (filed Mar. 1, 2002), pp. 12-19. *See also,* Comments of Verizon, CC Doc. No. 01-337 (filed Mar. 1, 2002); Reply Comments of BellSouth Corporation, CC Doc. No. 98-146 (filed Oct. 9, 2001); Comments of BellSouth Corporation, CC Doc. No. 98-146 (filed, Sept. 24, 2001); Reply Comments of SBC Communications Inc. and BellSouth Corporation, GN Doc. No. 00-185 (filed Jan. 10, 2001); Comments of SBC Communications, Inc. and BellSouth Corporation, GN Doc. No. 00-185 (filed Dec. 1, 2000); and, Comments of BellSouth Corporation, CC Doc. No. 98-146 (filed Sept. 14, 1998).

[54] Comments of BellSouth Corporation, CC Doc. No. 01-337 (filed Mar. 1, 2002), pp. 17-18. For additional disparities, see Exhibit 1.

access multiplexer ("DSLAM") under certain circumstances.[55] And, state commissions are permitted to impose additional unbundling obligations on ILECs.[56]

There may be more disparities. A past Commission has asked whether it should require ILECs to unbundle spectrum that flows over fiber optic cables or to provide a combination platform of UNEs for data similar to the UNE-P for voice.[57] Either of these proposals, if adopted, would further hamper ILEC deployment of broadband services.

B. Existing Regulatory Disparities Already Impair Competition from ILEC DSL Services, and The Impact of This Impairment Is Increasing

Existing regulations of ILEC broadband offerings have impaired deployment of ILEC advanced services. For example, SBC Communications Inc. ("SBC") attempted to accelerate its deployment of DSL-capable digital loop carrier ("DLC") line cards in remote terminals in "Project Pronto". Early on, the Illinois Commerce Commission required (but later amended its requirement) the unbundling of DLC similar to a proposal currently being considered by this Commission. Concluding it could not earn a return on its investment at prices below costs, SBC ceased further deployment.[58]

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[55] *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Doc. No. 96-98, *Third Report and Order and Fourth Further Notice of Proposed Rulemaking*, 15 FCC Rcd 3696, 3838-39 (1999) ("*UNE Remand Order*").

[56] 47 C.F.R. § 51.317 (b)(4).

[57] *See, In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 16 FCC Rcd 2101 (2001); *Order on Reconsideration*, 15 FCC Rcd 17806 (2000).

[58] BellSouth Comments, CC Doc. No. 01-337 (filed Mar. 1, 2002), Exhibit 1, pp. 21-22 (Professor Robert G. Harris, "Deployment of Broadband Networks and Advanced Telecommunications" (Dec. 19, 2001)("Harris Paper"). The Harris Paper is attached hereto as Exhibit 2.

The threat of additional, new regulations is further deterring deployment of advanced services by ILECS. For example, BellSouth has postponed certain decisions pending the outcome of several state and Commission decisions. BellSouth has deployed DSL in its region, but most of that deployment has been in offices with enough space to locate new equipment and where re-engineering has been least expensive. It has worked on an "integrated solution" with a DSL vendor that would allow it to serve areas that otherwise would not be practical to serve or to compete with existing cable modem services. This solution would involve the use of line cards in BellSouth's DLC system at its remote terminals, and it could significantly reduce BellSouth's initial capital outlay by avoiding the need to remotely deploy digital subscriber line access multiplexers ("DSLAMs"). This would allow BellSouth to reduce its initial costs of serving certain areas by moving from remote DSLAMs that can cost between $30,000 and $100,000, to less than $10,000 for the line card.

The integrated solution would expand BellSouth's potential DSL market of over 4M lines that are served by remote terminals, including many in rural areas of the Southeast. BellSouth believes this solution would yield little margin. BellSouth's deployment of this innovative solution has been deterred by the uncertainty over whether it will have to incur additional costs of unbundling the line card, which will be difficult and costly at best. BellSouth would be disadvantaged to the extent BellSouth's cable competitors will not incur these costs and by the fact that it might have to offer the line cards at TELRIC prices.

The negative impact of disparate regulation is increasing. As BellSouth demonstrated in its Comments to this Commission in CC Docket No. 01-337[59], the initial upgrades of the voice network to digital were relatively easy and inexpensive. However, current market conditions have tightened considerably for all participants, including ILECs. So even if disparate regulations only reduce ILEC investment at the margin, they can substantially retard deployment because of the effect on competitive dynamics and network interdependencies between broadband availability and applications development.

Yet, like all other ILECs, BellSouth faces significant additional investments if it is to provide additional advanced services requiring up to 100 megabits per second ("mbps"). DSL provides up to 1.5 mbps of data downstream and limited upstream capacity. However, at least one entity, TechNet believes that the broadband market will require transmission speeds of 100 mbps and this "will require network providers to invest hundreds of billions of dollars to upgrade infrastructures and increase bandwidth capacity to the last mile, primarily by providing new fiber connections to homes and offices."[60] ILECs cannot provide such data rates without significant new investments, and like the cable companies, the ILECs must be given a fair opportunity to recover their investment.

BellSouth has attached hereto a paper prepared by Professor Robert G. Harris.[61] The Harris Paper defines the broadband market and explains in greater detail than

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[59] *Id*., pp. 11-13.

[60] "A National Imperative: Universal Availability of Broadband by 2010", TechNet, http://www.technet.org/issues/updates//2002-01-15.69.phtml, Executive Summary ("TechNet Report").

[61] Harris Paper, Exhibit 2 hereto.

outlined here the need for the Commission to promote facilities-based investment by ILECs. It also identifies several existing Commission-created disincentives (*e.g.*, the use of regulated rates for broadband interconnection, resale, and UNEs, the use of TELRIC pricing, the impact of regulation as a disincentive on investment decisions, and the effect of price regulation on a competitive market).

V. THE COMMISSION CAN FIND THE INSTANT TRANSACTION TO SERVE THE PUBLIC INTEREST BY FIRST ELIMINATING THE DISPARITIES IN REGULATION BETWEEN CABLE MODEM SERVICE AND DSL SERVICE TO ENSURE MEANINGFUL COMPETITION FROM DSL SERVICE

To address these issues, the Commission could follow past Commissions. It could impose additional regulations on the cable industry to force them to open their cable networks to competitors as it did in *AOL Time Warner*. However, that would be inconsistent with a congressional mandate to deregulate the market and allow competitive forces rather than government regulation to govern the broadband services mass market. This is especially true in this case because ILECs have shown a willingness to compete in the broadband services mass market. And, as the experience in the cable market has shown, where ILECs are permitted to compete with cable companies under similar regulations, they can and do reduce cable prices and increase services to the public.

The benefits of such deregulation are indisputable. The Commission has acknowledged that: "investments in facilities used to provide service to nascent markets are inherently more risky than investments in well established markets. Customer demand is also more difficult to predict accurately than is the demand for well established services."[62]

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[62] *UNE Remand Order*, p. 3839.

Compelling ILECs to open their new investments to their competitors increases the ILECs' risks by shifting substantial investment risks from CLECs to the ILEC. It is also unfair in the case of broadband services, in general and DSL services, specifically. BellSouth is not the dominant or even prevalent competitor in the residential broadband market, cable providers are the dominant providers. Yet, cable providers do not bear these regulatory costs or uncertainties. They do not even have to unbundle their networks for their competitors.

The Commission has long recognized that: "aspects of dominant carrier regulation may hinder competition … if applied to a carrier that no longer possesses market power."[63] Therefore, it is bad public policy to regulate ILECs as dominant carriers in the broadband services market as this creates inefficiencies and hurts consumers by delaying deployment of DSL services. Other benefits will flow from reducing regulatory disparities.

Specifically, in the *Wireline Broadband Proceeding,* the Commission can and should forbear from enforcing 1) any price cap regulations for ILEC broadband services, 2) the requirement for ILECs to file tariffs on more than one day notice with cost support, 3) restrictions on contract carriage, and 4) any dominant carrier Section 214 requirements that might apply.

The Commission should also remove UNEs related to broadband services from the UNE list. The Commission could also interpret Section 251 (c) in a manner that would permit the ILECs to invest in new technologies and have an opportunity to reap the

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[63] *In the Matter of Comsat Corporation Petition Pursuant to Section 10(c) of the Communications Act of 1934, as amended, for Forbearance from Dominant Carrier*

economic rewards of that investment without having to share those new facilities under uneconomic terms and conditions with their competitors. This would put the ILECs on parity with cable companies for purposes of offering new, innovative and competitive broadband services. BellSouth summarizes the benefits of such deregulation below.

Forbear from Pricing Regulation

The Commission has acknowledged that dominant carrier rate regulation was intended to replicate the discipline of a competitive marketplace.[64] Price cap regulation was intended to increase productivity and efficiency and promote innovation in the absence of competition. However, in markets such as the mass market for broadband services where the ILECs are trying to compete and innovate and where they do not have any unfair competitive advantages, the Commission must allow the market to provide that disciplining function through pricing flexibility for the ILECs.

Streamline Tariffing Regulations

The Commission has also found that, when a carrier lacks market power, a tariffing requirement is unnecessary to maintain just and reasonable rates and is even "counterproductive since it can inhibit price competition, service innovation, entry into the market, and the ability of carriers to respond to market trends."[65] If ILECs are subject to dominant carrier regulations in their deployment of DSL services and other broadband services, competing cable companies like AT&T Comcast would be able to subject them

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Regulation and for Reclassification as a Non-Dominant Carrier, 13 FCC Rcd 14083, 14118, ¶ 66 (1998).

[64] *In the Matter of Price Cap Performance Review for Local Exchange Carriers; Access Charge Reform,* CC Doc. No. 94-1, 12 FCC Rcd 16642, 16701, ¶ 150.

[65] *In the Matter of Tariff Requirements for Nondominant Common Carriers,* 8 FCC Rcd 6752, 6752 ¶ 2 (1993).

to protracted Commission review procedures and force them to disclose sensitive pricing and other information.

Lift Contract Tariff Restrictions

Cable companies may negotiate with ISPs for the use of their cable facilities on commercial terms.[66] ILECs must be permitted to enter into such individually tailored agreements. By permitting ILECs to enter into such individualized contracts, the Commission will serve the public interest by allowing the ILECs to meet the customer's specific needs. It also will reduce the risk that cable companies will be able to enter into discriminatory contracts with customers.

Remove UNE Requirements Related to Broadband Services from List of UNEs

Neither cable companies nor any other provider of broadband services is required to unbundle their networks as the ILECs are. And, as shown above, those unbundling obligations are discouraging ILEC investment and innovation and prevent ILECs from differentiating their new broadband services, thus limiting their ability to reap the benefits of the risks they must take to enter this new market. Section 251 (d)(2) empowers the Commission to specify network elements. The Commission should use that power to ensure that no new unbundling requirements are added to the UNE list, even by state commissions, and it should aggressively eliminate those dealing with broadband service deployment.

The resale, unbundling and collocation requirements of the Act were created in 1996 to open the ILECs' existing networks to competitors to facilitate competition while

[66] AT&T Comcast Public Interest Showing, p. 93.

the competitors built their own facilities. With respect to broadband facilities, the ILECs stand in the same shoes as cable companies, CLECs and others. They have to make new investments, take new risks, and differentiate their products like their competitors. Indeed, if the ILECs are required to unbundle and resell their DSL services, CLECs and others are less likely to invest in facilities of their own.

Congress understood that the public interest would be served by creating incentives for ILECs to make these investments and to take such deregulatory steps as are necessary to foster that incentive. The Commission cannot ignore that directive in this proceeding.

By creating such parity, the Commission will eliminate those aspects of the instant transaction that are contrary to the public interest. It will eliminate existing impairments to competition from ILEC DSL providers, reduce the impact of concentrating market power in AT&T Comcast in the broadband services mass market, reduce the risk that customers will incur higher prices or lower quality for cable modem services, and do this through deregulation rather than regulation. Accordingly, the Commission should deregulate ILEC DSL offerings before approving the instant transaction.

VI. FEDERAL PROGRAM ACCESS RULES MUST CONTINUE TO APPLY TO AT&T COMCAST'S CABLE PROGRAMMING NETWORKS

Comcast owns significant interests in QVC (58%), E! Entertainment (40%), The Golf Channel (91%), The Outdoor Life Network (100%), Discovery Health Channel (20%), iN DEMAND (11%) and style (40%) today.[67] BellSouth currently is able to offer E! Entertainment, The Golf Channel, iN DEMAND, The Outdoor Life Network,

[67] *Id.,* p. 15.

Discovery Health Channel, and QVC on its cable systems that compete with Comcast due in large part to the requirements of Section 628 of the Cable Competition and Consumer Protection Act of 1992. [68]

This section generally requires that programming owned or controlled by an incumbent cable operator ("vertically integrated" programming) be made available to its competitors on non-discriminatory terms and conditions. The touchstone of Section 628 is Section 628(c)(2)(D), which generally prohibits exclusive contracts between vertically integrated cable networks and incumbent cable operators. However, Section 628(c)(2)(D)'s ban on exclusivity will "sunset" in October 2002 (unless extended by this Commission).[69]

The proposed merger would create a new incentive for Comcast to withhold those networks from BellSouth and other MVPDs not only in its former Comcast properties but also in its newly acquired AT&T Broadband properties. This incentive would be heightened further by the addition of AT&T's 10% interest in E!, its 10% interest in style, and its 44% interest in iN DEMAND.[70] AT&T Comcast's interests would increase to 50% of E!, 55% of iN DEMAND, and 50% of style.

The Commission is considering whether to extend the current prohibition against exclusive contracts between vertically integrated cable networks.[71] BellSouth Entertainment, L.L.C. is participating in that proceeding and filed Joint Comments and

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[68] 47 U.S.C. § 548.

[69] *Id.*

[70] AT&T Comcast Public Interest Showing, p. 25.

[71] *In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Sunset of Exclusive Contract Prohibition*, CS Doc. No. 01-290, FCC 01-307 (rel. Oct. 18, 2001) ("*Program Access Proceeding*").

Joint Reply Comments.[72] The Joint Comments and Joint Reply Comments requested the Commission to extend the requirements of Section 628.

The Joint Comments showed that concentration of ownership in the cable industry has increased since 1992 and, thus, the marketplace conditions that caused the program access problem have worsened materially. As noted above, the instant application would further increase that concentration by uniting the number 1 and number 3 cable operators.

The Joint Comments and Joint Reply Comments also demonstrate that the prohibition against exclusive contracts between vertically integrated cable networks and incumbent cable companies must be retained if there is to be meaningful competition to incumbent cable companies. For example, they show that, in the Philadelphia market, Comcast denied DBS competitors access to Comcast Sportsnet, citing the "terrestrial distribution" loophole to Section 628.[73] As a result, Nielsen reported that, of the 2.7 million television households in that market, only 3.7% subscribe to DirecTV or EchoStar.[74] By contrast, nationally, those DBS providers serve 15% of all television households.

Comcast's motives then and now are clear and a matter of public record:

> Comcast's purchase of the Philadelphia Flyers, 76ers and Phantoms inspired the company to start up a regional sports network …. The question now is whether [Comcast President Brian] Roberts can capitalize

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[72] The Joint Parties included on those pleadings are Altrio Communications, BellSouth Entertainment, LLC, the Independent Multi-family Communications Council ("IMCC"); Qwest Broadband Services, Inc.; and The Wireless Communications Association International, Inc. Joint Comments, CS Doc. No. 01-290 (filed Dec. 3, 2001) ("Joint Comments"); Joint Reply Comments, CS Doc. No. 01-290 (filed Jan. 7, 2002) ("Joint Reply Comments").

[73] *DirectTV v. Comcast Corp.*, 13 FCC Rcd 21, 822 (1998).

[74] Horn, "Prices Tend to Rise as Competition Lags for Cable TV," *The Philadelphia Inquirer*, at p. C01 (June 3, 2001).

> on an apparent loophole in the 1996 Telecommunications Act in order to lock up the Philly area's sports programming. "We don't like to use the words 'corner the market,' because the government watches our behavior," Roberts says with a laugh. "Let's just say we've been able to do things before they are in vogue."[75]

Thus, as shown more fully in the Joint Comments and Joint Reply Comments, if AT&T Comcast were allowed to deny BellSouth Entertainment access to its popular programs such as E!, QVC, or any other network in which it holds a significant ownership interest, BellSouth would be significantly disadvantaged in the market. Moreover, cable programmers would have fewer opportunities to sell their programming after the transaction and will therefore be more likely to enter into exclusive (or highly favorable) agreements with the largest MSO, AT&T Comcast.

The instant transaction clearly would result in additional concentration in the cable industry and would increase the very risks to cable competitors that Section 628 was intended to reduce. It is yet another reason why the Commission should extend the requirements of Section 628 in CS Docket No. 01-290.

[75] "The New Establishment," Vanity Fair, at 166 (Oct. 1997).

VII. CONCLUSION

For the reasons set forth above, BellSouth respectfully requests the Commission to condition its approval of the instant Applications of AT&T Corporation, Comcast Corporation and AT&T Comcast Corporation on the elimination of the disparities in regulation between ILEC DSL services and cable modem services. It also requests the Commission to extend the program access provisions of Section 628 of the Cable Television Consumer Protection and Competition Act of 1992 in CS Docket No. 01-290.[76]

Respectfully submitted,

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[76] *Program Access Proceeding.*

CERTIFICATE OF SERVICE

I do hereby certify that I have this 29th day of April 2002 served the following parties to this action with a copy of the foregoing ***COMMENTS OF BELLSOUTH*** by electronic filing, email and/or by placing a copy of the same in the United States Mail, postage prepaid to the parties listed below.

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